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No. 87-271

# In the Supreme Court of the United States

**October Term, 1987**

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,
*Petitioner,*

v.

EUGENE F. BRIECK,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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## AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

Amicus Curiae files this Brief in support of Petitioner pursuant to Rule 36 of the Rules of the Supreme Court of the United States. The written consents of Petitioner and Respondent have been filed with the Court.

## INTEREST OF AMICUS CURIAE

The Chamber of Commerce of The United States ("Chamber") is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade and professional organizations in the United States. The Chamber has over 180,000 corporate, partnership and proprietorship members, as well as state and local chambers of commerce and trade associations. The Chamber's members employ approximately 22,817,000 persons.

The Chamber regularly represents its members in important employment and labor relations matters, such as this case, before the United States Courts, the United States Congress and the Executive Branch and regulatory agencies of the United States.

The Chamber's members have a significant interest in the question presented in this case. This Court has been asked to determine whether Respondent, who alleges intentional employment discrimination, properly avoided summary judgment merely by questioning Petitioner's business judgment, without presenting any evidence, direct or indirect, that Petitioner's judgment was in fact motivated by an intent to discriminate. This question arises from the standard for resolving summary judgment motions in employment discrimination cases which has been adopted by the United States Court of Appeals for the Third Circuit. In its *in banc* decision in *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 108 S. Ct. 26 (1987), and in this case, the Third Circuit reversed summary judgments entered for employers and held that a plaintiff in an employment discrimination case may avoid summary judgment by merely casting doubt on the credibility of the employer's articulated reasons for the



employment action, regardless of whether or not the plaintiff presented *any* evidence of discrimination. This standard is not only contrary to this Court's precedent but also severely restricts the power of trial courts to decide cases before trial.

Indeed, the Third Circuit has virtually eliminated the possibility of summary judgment in employment discrimination cases, which continue to crowd the federal courts' already overburdened dockets. This results in a significant restriction of the available options Chamber members have in defending such cases, and in an escalation of the already high costs of litigation as more of these cases proceed to expensive and time-consuming trials. If this Court adopts the Third Circuit's standard for resolving employment discrimination summary judgment motions, the federal courts will become, whenever an employee attacks an employment decision, nothing more than second guessers of Chamber members' routine business judgments. This, of course, is not the role of the federal courts. Therefore, the Chamber submits that it is vital to its members' inherent managerial prerogatives, and to the management of federal court dockets, that this Court reject the Third Circuit's standard for resolving summary judgment motions in employment discrimination cases.

## SUMMARY OF ARGUMENT

The Third Circuit's standard for resolving employment discrimination summary judgment motions directly conflicts with this Court's general teachings regarding summary judgment. Under the Third Circuit's standard, a plaintiff can avoid summary judgment, can proceed to trial, and can ultimately prevail, without ever establishing a causal nexus between the adverse employment action

and any statutorily-forbidden criterion. This standard has not only virtually eliminated summary judgment in employment discrimination cases in the Third Circuit but also, as a practical matter, severely and unfairly hinders the defense of such actions.

The Third Circuit's standard also conflicts with this Court's rulings on the proper allocation of the burden of proof in employment discrimination cases. Unless this Court rejects the Third Circuit's flawed approach to summary judgment, plaintiffs will be able to proceed to trial with cases that should have been disposed of on summary judgment as factually unsupportable. Congress never intended that the federal anti-discrimination statutes should become vehicles for second-guessing an employer's routine business and employment decisions, and this Court should not place its imprimatur on such an unsanctioned result.

## ARGUMENT

### THE THIRD CIRCUIT'S SUMMARY JUDGMENT STANDARD IN EMPLOYMENT DISCRIMINATION CASES SHOULD BE REVERSED AS A MATTER OF LAW AND POLICY

#### The Third Circuit Has Ignored This Court's Instruction That Summary Judgment Is An Important Part Of Federal Procedure Intended To Dispose Of Unsubstantiated Claims Prior To Trial And, Instead, Has Virtually Eliminated Summary Judgment In Employment Discrimination Cases.

This Court's 1986 trilogy of summary judgment cases soundly reaffirms, and indeed mandates, the vitality and



effectiveness of summary judgment as the proper and efficient way of eliminating unfounded claims without the time and expense a trial requires. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574 (1986). These decisions serve as a well-needed tocsin that federal courts can and should dispose of unmeritorious claims before trial.[1]

In *Celotex Corp.*, this Court unequivocally stressed the important role served by summary judgment in the overall scheme of the Federal Rules of Civil Procedure:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

477 U.S. at 327.

Further, in *Celotex Corp.* this Court admonished the lower courts that, under Rule 56, they must be cognizant of the rights of persons opposing factually unsupportable claims or defenses to have such claims or defenses disposed of prior to trial:

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[1]Federal courts, and particularly the Third Circuit (both historically and recently), have not always embraced the summary judgment procedure. *See* Schwarzer, *Summary Judgment under The Federal Rules: Defining Genuine Issues of Fact*, 99 F.R.D. 465, 466-67 (1984) ("Discussions of summary judgment [by the federal courts] generally consist of formalistic rhetoric and often reflect a hostility toward summary procedures [and] an inclination toward sparing application of the rule .... This is a regrettable state of affairs, frustrating the intent of those who drafted Rule 56 and of the Supreme Court and Congress which adopted it to further the efficient and economical resolution of issues not requiring ... trial.")

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

*Celotex*, 477 U.S. at 327.

Because the flood tide of employment discrimination cases continues in the federal courts, the role of summary judgment in promoting the just, speedy and inexpensive determination of cases demands even greater emphasis. As of June 30, 1987, approximately 10,500 private employment-related civil rights cases were pending in the federal courts.[2] During the 12 months preceding that date, nearly 9,000 additional employment-related civil rights cases were filed in the federal district courts.[3] Even more striking is the fact that a greater percentage of employment-related civil rights cases go to trial than any other category of federal question and diversity cases.[4]

[2]Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (1987), Table S-12 (at 116).

[3]*Id.*, Table C-2 (at 178).

[4]*Id.*, Table C-4 (at 209). The statistical data establishes that on a national level 14.3% of the employment-related civil rights cases reached trial in the 12 month period ending June 30, 1987, while only 8.0% of diversity cases reached trial, and only 5.6% of all federal question cases reached trial, during that same period. Table C-4 (at 209, 210). Further, the vast majority of [illegible] trials in employment-related civil rights cases, which are available, for example, under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, lasted from between 4 to 9 days. Table C-8 (at 226).



Therefore, in light of *Celotex Corp., Anderson, and Matsushita*, and in light of the already large federal court case load, the use of the summary judgment procedure should be heartily endorsed by the courts of appeals. Indeed, most have done just that. But the Third Circuit's standard in employment discrimination cases, because it permits plaintiffs to go to trial without adducing any evidence of discrimination, completely eviscerates Rule 56 and makes summary judgment for defendants a chimera.

As aptly stated by the United States District Court for the Western District of Pennsylvania in *Treese v. Chevron Corp.*, 666 F. Supp. 76 (W.D. Pa. 1987), *aff'd w/o op.*, No. 87-3608, 1988 U.S. App. LEXIS 5196 (3d Cir. March 24, 1988), "Defendant attempts what is now nearly impossible—summary judgment in an age discrimination case."[5] Similarly, as noted by one commentator:

> The [Third Circuit] court of appeals' reputation for summary judgment is not soft either. The court has been roundly criticized by trial judges and litigators because it scours the record to find a scintilla of evidence raising a factual issue. Chief Judge John P. Fullam of the Eastern District of Pennsylvania joked that

[5]In *Treese*, plaintiff filed an ADEA action alleging that his discharge was based upon his age. 666 F. Supp. at 76. Defendant moved for summary judgment contending that plaintiff's suit should be dismissed because it was filed beyond the two year limitations period for ADEA claims, and because plaintiff presented no evidence of "willfulness" which would have entitled him to the ADEA's three year limitations period. *Id.* at 76-77. The district court agreed holding that plaintiff could not satisfy even the "minimum quantum" of evidence under the heightened evidentiary standard for finding a willful violation of the ADEA. *Id.* at 77. The district court, however, further remarked that plaintiff likely would have avoided summary judgment based upon the evidence he presented "in light of *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987), if this case had been filed within two years of plaintiff's discharge." 666 F. Supp. at 77.

> the court of appeals "can find an issue of fact under a rock."

Weakland, *Life In The 3rd Circuit*, The Pennsylvania Lawyer 6, 8 (Oct. 1987).[6]

The Third Circuit's *in banc* decision in *Chipollini* and its progeny clearly illustrate the Third Circuit's microscopic search for a fact issue and its misapplication of this Court's precedent. In fact, in *Chipollini, Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 730 (1988), and the instant case, the Third Circuit reversed summary judgments on the basis that, to avoid summary judgment and thereby proceed to trial, a plaintiff must only cast doubt on an employer's articulated reasons for the attacked employment action, without adducing any direct or indirect evidence of discrimination.[7]

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[6]Unlike several other courts of appeals, there appears to be a lack of published empirical data regarding the Third Circuit's rate of reversal or affirmance of summary judgments. *See, e.g., Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987), where in light of *Celotex and Anderson*, the Second Circuit went to great lengths to point out to the bar that a recent study had confirmed a high affirmance rate by the Second Circuit in summary judgment cases; Schwarzer, *supra* at 467 n 9 (data on Ninth Circuit); Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 Geo. L. J. 1065, 1113 n. 347 (April 1986) (listing various studies regarding summary judgment reversal and affirmance rates in courts of appeals and district courts). In his article on the Third Circuit, Weakland states that most civil case reversals in the Third Circuit in 1986 involved summary judgment or Rule 12 dismissals. Weakland, *supra*, at 7. According to Weakland, of the 133 published reversals in civil cases in the Third Circuit in 1986, 79 dealt with either summary judgment or Rule 12 dismissals. *Id.*

[7]The Third Circuit has also utilized this same analysis in reversing judgment notwithstanding the verdict for an employer in an ADEA action. *See Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258 (3d Cir.

*(Continued on next page)*



In *Chipollini*, the plaintiff presented no evidence of age discrimination—he merely asserted that the defendant's proffered reasons for his termination from employment were untrue. 814 F.2d at 899-901; *see also* 814 F.2d at 904 (Hunter, J. dissenting). The Third Circuit held that this assertion was sufficient to avoid summary judgment because "the issue of pretext turns on Spencer's [the employer's] credibility . . . ." 814 F.2d at 901. According to the Third Circuit, "a plaintiff can prevail by means of indirect proof that the employer's reasons are pretextual without presenting evidence specifically relating to age." *Id.* at 898. The Third Circuit held that the proper analysis is as follows:

> the [district] court should have considered whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably *could* support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence *necessarily* leads to that conclusion that the employer did act for discriminatory reasons.

814 F.2d at 900 (emphasis in original), citing *Graham v. F. B. Leopold Co.*, 779 F.2d 170, 172-73 (3d Cir. 1985).[8]

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*(Continued)*

1987). For application of this analysis to other discrimination claims resulting in a reversal of summary judgment, *see Jackson v. University of Pittsburgh*, 826 F.2d 230 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 732 (1988) (race).

[8]The *Graham* decision started the Third Circuit down the road to the inevitable review by this Court of its flawed summary judgment standard. There, plaintiff, who had been terminated as a result of a corporate reduction in force, brought an ADEA action challenging his termination. The Third Circuit reversed the district court's entry of summary judgment for the defendant. In *Graham*, as in *Chipollini*, there was insufficient evidence to create a genuine issue of fact regarding whether the employer's articulated reason was really a pretext for age

*(Continued on next page)*

Thus, the Third Circuit acknowledged in *Chipollini* that it has, in effect, removed the requirement that a plaintiff prove that he or she was discriminated against because of age.

Similarly, in *Sorba*, also an ADEA action, the Third Circuit reversed the district court's entry of summary judgment for the employer on the basis of plaintiff's assertion that his employer's articulated reason for his discharge, *i.e.*, poor job performance, was unfounded. 821 F.2d at 203-205. Relying upon *Chipollini*, the Third Circuit held that:

> The district court's error in this case is the same as that of the district court in *Chipollini*. To defeat a summary judgment motion based only on a defendant's proffer of a nondiscriminatory animus, a plaintiff who has made a *prima facie* showing of discrimination, need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence.
>
> In this case, Sorba's trial burden will be to show that it is more likely than not that the employer did *not* discharge him because of the poor results on his last three

*(Continued)*
discrimination. In dissent, Judge Adams criticized the majority for its overreaching, which he believed was designed to create a "factual dispute":

> I merely state that, in my view, the record presented here does not reasonably support an inference that the decision to terminate Graham was caused by anything but economically motivated efforts at reorganization. If courts strain to find snippets of evidence to support highly questionable inferences of discriminatory conduct they not only will unduly hobble necessary restructuring by hard-pressed industries, but eventually cause Congress to reconsider the controlling legislation.

779 F.2d at 175.



> jobs. Therefore, to defeat a summary judgment motion, the evidence need only establish a reasonable inference that the employer did not dismiss Sorba because of his poor performance.

821 F.2d at 205 (emphasis in original; footnote omitted). As in *Chipollini*, plaintiff presented no evidence which directly or indirectly related to age discrimination.

In the instant case, like *Chipollini and Sorba*, the Third Circuit reversed the district court's entry of summary judgment for Petitioner without any showing that any dispute of material fact existed which would demonstrate that Petitioner's articulated reasons for Respondent's lay-off were a pretext for age discrimination. *See* Pet. App. 10a-11a (Weis, J. dissenting). Here, Respondent was laid-off pursuant to a reduction in force while Petitioner retained a younger employee because of his more diverse skills and broader experience. *Id.* at 3a. In opposing summary judgment below, Respondent did not challenge Petitioner's claim that the younger employee had the more diverse background; instead, he questioned only Petitioner's business judgment that such diverse experience was utilized enough to justify the younger employee's retention. *Id.* at 5a. The Third Circuit held that this, without any more, was enough to avoid summary judgment and proceed to trial.

Simply put, the Third Circuit's summary judgment standard, as set forth in *Chipollini, Sorba* and this case, cannot be reconciled with this Court's mandate that the ultimate issue in a discrimination case is whether the employer engaged in intentional discrimination. *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,

805 (1973); *see also,* Milone, *Age Discrimination: Proving Pretext Under The ADEA,* 13 Empl. Rel. L.J. 104, 108 (1987). This burden of persuasion remains at all times with the plaintiff. *Burdine,* 450 U.S. at 253. The defendant is not required to prove, at any stage, the absence of a discriminatory motive. *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 25 (1978) (per curiam). Yet, by permitting a plaintiff to defeat a summary judgment motion and even, ultimately, prevail at trial without presenting any evidence of discrimination, the Third Circuit has impermissibly shifted the burden of persuasion from plaintiff to defendant. *See Chipollini,* 814 F.2d at 902-904 (Hunter, J. dissenting).[9] Accordingly, the Third Circuit's decision in *Chipollini* and its progeny, including the instant case, represent a fundamental departure from the *McDonnell Douglas/Burdine* analysis which this Court should not permit.

As noted, the Third Circuit's standard virtually eliminates summary judgment in employment cases. This not only severely hinders the defense of such actions by unfairly restricting the employer's available options and

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[9]The Fifth Circuit, in *Elliot v. Group Medical & Surgical Serv.,* 714 F.2d 556 (5th Cir. 1983), *cert. denied,* 467 U.S. 1215 (1984), explicitly rejected such a shifting of the burden of persuasion and reversed a jury verdict in favor of a group of employees who had been terminated in connection with a corporate reorganization:

> *McDonnell-Douglas* is not a vehicle that permits a plaintiff to cast the burden of persuasion on the defendant and compel him to prove that his actions were nondiscriminatory. Nor is it a device which permits the jury to examine an employer's reasons for discharge and determine that the employer's business judgment or policies do not appeal to its sensibility. The inquiry is whether the plaintiff has been discriminated against because of his age; the ADEA proscribes no other conduct.

714 F.2d at 566-67 (citation omitted).



litigation strategy, but also serves to increase the likelihood that factually unsupportable and even frivolous cases will reach trial. A disgruntled employee can, and generally does, easily question, through self-serving affidavits, his or her employer's proffered reasons or business judgment for an adverse employment decision. There can be no doubt that, if this Court does not reject the Third Circuit's flawed analysis, the result will be far more trials, far higher settlement costs and far higher defense costs. Certainly plaintiffs, even (perhaps, particularly) in dubious cases, will perceive their positions to be stronger than ever. Such a situation will completely undermine the clear purpose of Rule 56 to dispose of, efficiently and effectively, claims which are based upon speculation.

Indeed, the Third Circuit's summary judgment standard is also antithetical to the standard several other courts of appeals have applied when resolving such motions under the *McDonnell Douglas/Burdine* analysis. These courts recognize that summary judgment occupies just as important a role in employment discrimination cases as in any other type of case. The fact that employment discrimination cases involve questions of motivation or intent has no bearing on the availability of summary judgment. *Anderson,* 477 U.S. at 256-57. As stated by the Second Circuit in *Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir.), *cert. denied,* 474 U.S. 829 (1985):

> The summary judgment rule would be rendered sterile, however, if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion. Indeed, the salutary purposes

of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to commercial or other areas of litigation.

As we have stated, "[a] party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial for in doing so he risks the possibility that there will be no trial." . . .

To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial in all Title VII cases. Given the ease with which these suits may be brought and the energy and expense required to defend such actions, we believe the trial judge properly granted summary judgment.

759 F.2d at 998 (citations omitted).

So also, in *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987), the First Circuit affirmed summary judgment for the employer, despite the plaintiff's attempts to discredit the employer's articulated reason for the discharge. The court noted that the plaintiff's challenge to the employer's stated justification "merely provide[s] another reason, totally unrelated to age, for his discharge." *Id.* at 15. The First Circuit held that:

> evidence contesting the factual underpinnings of the reason for the discharge proffered by the employer is insufficient, without more, to present a jury question. Plaintiff continues to carry the burden of showing discriminatory intent, and . . . [he] cannot meet his burden of proving "pretext" simply by refuting or questioning the defendants' articulated reason.



*Id.; see also White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.) ("[m]erely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent . . . ."), *cert. denied*, 469 U.S. 933 (1984).

Similarly, the Seventh Circuit in *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987), affirmed summary judgment for an employer which had proffered a nondiscriminatory explanation for a discharge. The Seventh Circuit held that a plaintiff "must establish a nexus" between the evidence which purported to show that the employer's explanation was unworthy of credence and age discrimination. *Id.* at 465. Because the plaintiff's evidence in *Dale* did not relate to age, and consisted principally of "self-interested assertions" which challenged the prudent business judgment of his supervisors, summary judgment was held to be appropriate. *Id.* at 464-65. Unlike the Third Circuit, the Seventh Circuit properly refused to allow plaintiff's assertions that his performance was adequate, without more, to defeat summary judgment.[10]

Likewise, in *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857 (5th Cir. 1986), the Fifth Circuit affirmed the district court's entry of summary judgment for the employer.

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[10]The Seventh Circuit also aptly noted that it "does not sit as a super-personnel department that reexamines an entity's business decisions." 797 F.2d at 464; *see also Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir.) (in employment discrimination case the Seventh Circuit reversed verdict for employee where district court had not concluded that employee had established that employer's reasons for discharge were a "pretext for discrimination" but, instead, had merely concluded that employer had insufficient cause to fire employee; plaintiff is required to "show not only a false reason but also a causal chain in which race or another forbidden criterion plays a dispositive role"), *cert. denied*, 108 S. Ct. 488 (1987).

There, plaintiff, an insurance agent, was discharged for submitting a false insurance claim for damages to his home. 803 F.2d at 858-59. He was then replaced by a younger employee. *Id.* Plaintiff brought suit asserting, *inter alia*, an ADEA claim. The Fifth Circuit, recognizing the impact of *Celotex* and *Anderson*, properly concluded that plaintiff had failed to produce any evidence establishing that the articulated reason for his discharge was a pretext for age discrimination. 803 F.2d at 860-61. The Fifth Circuit determined that, although plaintiff testified in his deposition that he believed that his employer had a policy of replacing employees over age 40 with younger agents to reduce expenses, he adduced no evidence of such a policy and "[t]estimony based on conjecture alone is insufficient . . . ." 803 F.2d at 860; *see also Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596-97 (11th Cir. 1987) (summary judgment in age and sex discrimination case affirmed; plaintiff's "conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination . . . .")

In stark contrast to these holdings of other courts of appeals, a plaintiff in the Third Circuit can avoid summary judgment, can plead his case to the jury, and can ultimately prevail without ever providing any direct or indirect evidence of a causal nexus between the adverse employment action and a statutorily prohibited reason, for example, as here, age. This is hardly the kind of situation that Congress envisioned when it enacted Title VII and ADEA to remedy only certain narrowly-defined types of employment decisions—ones which are based upon discriminatory reasons.

The federal anti-discrimination statutes were never intended to provide a forum for disgruntled employees to



air their complaints. They do not impose (and were never designed to impose) upon employers the burden of establishing a just or proper cause for their personnel decisions. Yet, this is exactly the result which occurs under the Third Circuit's standard. Accordingly, it is imperative that this Court reemphasize that *McDonnell Douglas* and *Burdine* require not only proof that plaintiff suffered an adverse employment action, but also that this adverse employment action happened to plaintiff because of his or her race, age, sex or some other statutorily-prohibited reason. Without this logical nexus between the adverse employment action and a statutorily-prohibited reason, the *McDonnell Douglas/ Burdine* analysis becomes nothing more than a hollow shell. In such a situation, an employer likely will face ever increasing liability merely because a jury or judge may disagree with its reasons for an employment decision.

The Third Circuit itself seems to recognize that its new standard results in giving the anti-discrimination laws an effect never contemplated by Congress. In *Chipollini*, the Third Circuit offered this advice to employers: "A defendant which is less than honest in proffering its reason for discharge risks an unnecessary age discrimination verdict." 814 F.2d at 899. Thus, the Third Circuit has admitted that it has turned the federal anti-discrimination statutes into codes of good faith and fair dealing. In other words, the Third Circuit's standard has changed these laws from ones designed to prevent discrimination into laws which punish employers for not being brutally frank with their employees.

The Third Circuit completely ignores the fact that an employer's articulated reason for terminating an employee may be "pretextual" without violating the ADEA or any other civil rights statute. *See Goldberg v. B. Green & Co.*,

836 F.2d 845, 849 (4th Cir. 1988). An employer motivated by unpublicized financial problems, a desire to spare the feelings of a loyal or long-term employee or even nepotism may provide an employee with an explanation which is not entirely accurate, although well-intentioned. *See, e.g., Askin v. Firestone Tire & Rubber Co.*, 600 F. Supp. 751, 755 (E.D. Ky. 1985), *aff'd w/o op.*, 785 F.2d 307 (6th Cir. 1986); *Chipollini*, 814 F.2d at 903 (Hunter, J. dissenting). In such circumstances, the employer has committed no illegal act under any statute, yet the Third Circuit permits a jury to hold otherwise.

Unless this Court rejects the Third Circuit's standard for resolving summary judgment motions in employment discrimination cases, plaintiffs will be encouraged more than ever to file suspect or dubious discrimination claims which will likely reach trial. Such a situation is inherently unfair to employers who often must make hard employment decisions based upon economic realities, and unduly increases the workload of an already overburdened federal court system.



## CONCLUSION

For all of the foregoing reasons, Amicus Curiae respectfully urges this Court to reverse the decision of the Third Circuit in this case and reject the Third Circuit's standard for resolving employment discrimination summary judgment motions.

Respectfully submitted,

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